U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 26Jun2002

Case No.: 2001-LHC-2624

OWCP No.: 1-152030

IN THE MATTER OF:

Thomas F. Fagan
Claimant

Against

Electric Boat Corporation
Employer/Self-Insurer

and

Director, Office of Workers' Compensation Programs
U.S. Department of Labor
Party-in-Interest

APPEARANCES:

Stephen C. Embry, Esq.
David N. Neusner, Esq.
For the Claimant

Edward W. Murphy, Esq.
Susan M. Saucier, Esq.
For the Employer/Self-Insurer

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Director

BEFORE: **DAVID W. DI NARDI**
District Chief Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on January 29, 2002 in New London, Connecticut, at which time all parties were given the opportunity to present

evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit and RX for an exhibit offered by the Employer. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
RX 17	Attorney Murphy's letter filing the	03/11/02
RX 18	February 20, 2002 Deposition Testimony Of Dr. Daniel A. Gerardi	03/11/02
CX 6	Attorney Neusner's letter filing his status report	04/04/02
CX 7	Attorney Embry's letter filing the	04/22/02
CX 8	April 11, 2002 Deposition Testimony of Dr. Stephen L. Matarese	04/22/02
CX 8A	Attorney Neusner's status report	05/10/02
CX 9	Claimant's brief	05/20/02
RX 19	Attorney Murphy's letter filing the	05/20/02
RX 20	Employer's Motion to Submit Additional Evidence, as well as	05/20/02
RX 21	A Clearer Copy of the Nature of Payment, dated August 13, 1993, a document admitted into evidence at the hearing as CX 4, as well as the	05/20/02
RX 22	September 1, 1993 Stipulation issued by the Compensation Commissioner of the Second District in Connecticut	05/20/02
RX 23	Attorney Murphy's letter filing the	05/22/02
RX 24	Employer's brief	05/22/02

ALJ EX 7	This Court’s ORDER granting the Employer’s Motion	05/23/02
CX 10	Attorney Embry’s letter filing his	05/23/02
CX 11	Fee Petition	05/23/02
CX 12	Claimant’s Response To The Employer’s Post-Hearing Evidence	06/05/02
CX 13	Attorney Embry’s Supplemental Fee Petition	06/10/02

The record was closed on June 10, 2002 as no further documents were filed.

Stipulations and Issues

The parties stipulate (JX 1), and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. Claimant alleges that he suffered an injury on February 17, 2001 in the course and scope of his maritime employment.

4. Claimant gave the Employer notice of the injury in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The parties attended an informal conference on June 20, 2001.

7. The applicable average weekly wage is $466.91, the National Average Weekly Wage as of the date of injury.

8. The Employer voluntarily and without an award has paid medical benefits for a total of $1,036.90.

The unresolved issues in this proceeding are:

1. Whether Claimant’s pulmonary problems are causally related to his maritime employment.

2. If so, the nature and extent of Claimant's disability.

3. Employer’s entitlement to a credit for the payment to Claimant on or about September 1, 1993, as reflected in RX 22.

4. The applicability of Section 8(f) of the Act.

Summary of the Evidence

Thomas F. Fagan, ("Claimant" herein), sixty-six years of age, with an employment history of manual labor, began working in 1958 as a painter/cleaner at the Groton, Connecticut shipyard of the Electric Boat Company (“Employer”), a maritime facility adjacent to the navigable waters of the Thames River where the Employer builds, repairs and overhauls submarines. He worked as a painter/cleaner for approximately five years, during which time he had duties of cleaning up the asbestos dust, lagging debris and other such items resulting from the construction and overhaul of the submarines. Asbestos sheets and blankets were used by the pipe laggers, welders and other trades to perform their assigned tasks. The cutting and application of asbestos caused asbestos dust and fibers to fly around the ambient air of the work environment. When the area was clear of other workers, he would then use a pneumatic hose to blow down the asbestos dust and other debris down to the bilges of the submarine, and he would then have to go down to the bilges to clean up that debris. He wore no face mask or other protection. (TR 18-23)

Claimant then became a so-called decontamination expert and his duties included, **inter alia**, disposing properly of nuclear waste, offloading water from the nuclear-powered submarines, etc., at the Employer’s Nuclear Repair Facility (“NRF”). He spent about ninety (90%) percent of his work time in the NRF and the remaining time hooking up the submarines to the NRF so that he could perform his other tasks. He also had to take care of the nuclear laundry cleaning the clothing worn by the laggers, welders and the other trades who work with asbestos, Claimant remarking that such clothing was covered with asbestos dust and fibers. He also had to decontaminate the nuclear equipment and the pipes covered with asbestos after their removal from the submarines, Claimant further remarking, **“If it had asbestos on it, we got it”** at the NRF. Claimant was daily exposed to asbestos dust fibers while he worked in that job. (TR 23-27) Claimant was daily exposed to asbestos dust and fibers while he worked in that job. (TR 28)

Claimant began experiencing shortness of breath in the latter part of the 1980s and he underwent bronchoscopy and a wedge excision of the right upper lobe to rule out the presence of lung cancer. That December 2, 1987 surgery has resulted in daily right sided chest pain, even in the absence of physical exertion. (CX 2)

Claimant’s shortness of breath was aggravated by any exertion at work and his breathing “was labored” when he stopped working in January of 1998. Stair-climbing and walking on inclines aggravates

his shortness of breath and he has not been able to play golf for the last 2-3 years, Claimant remarking that he regularly used to play three times each week. (TR 28-32)

Claimant's multiple medical problems are best summarized by the March 15, 2001 **Initial Evaluation** of Dr. Stephen L. Matarese, Claimant's pulmonary specialist, wherein the doctor reports as follows (CX 1 at 1-3, 4):

INITIAL EVALUATION

"HISTORY: Mr. Fagan presents to our office complaining of shortness of breath. He was referred to our office by his attorney because of significant asbestos exposure. His family physician is Dr. Duane Golomb. His present medications include Lopressor, Aspirin, Zantac and Lescol. Presently he complains of shortness of breath and dyspnea that is most noticeable with exertion. He denies any significant shortness of breath at rest. He denies any orthopnea. He had a surgical procedure performed by Dr. Yasher several years ago because of a granuloma that was seen in his right upper lobe. He underwent a wedge resection at that time. He also had radiographic evaluations by his employer, who informed him that he had pleural plaques. A CT scan of the chest done at Tollgate Radiology 1½ years ago also describes some scar tissue within his lung.

His review of systems is significant for coronary disease. He had a minor myocardial infarction in 1994 with a single vessel graft performed by Dr. Singh. He has also had two coronary stents placed in 1997.

His cardiovascular history is significant for carotid surgery performed in 1998...

He has **NO KNOWN DRUG ALLERGIES**.

His smoking history was approximately 1-1½-packs-per-day. He smoked for 30 years but quit smoking 14 years ago.

Occupational history is significant in that he worked at Electric Boat Groton Facility for 41 years where he was employed as a painter and then eventually as a decontamination technician. He was exposed extensively to asbestos dust and fibers while working on the ships.

"OBJECTIVE FINDINGS: BP 152/82. Pulse 80. Weight 173 lbs. Height 69". Age 65...

Pulmonary function data indicates a mixed obstructive and restrictive ventilatory defect. The FEV_1 to FVC ratio is reduced to

59%. However, the FVC is also reduced to 68% of predicted. Lung volumes show a reduction in the TLC to 66% of predicted and a mild reduction in the functional residual capacity. Diffusion capacity is moderately reduced.

"**ASSESSMENT**: I believe this patient has a significant asbestos exposure and with a history of pleural plaques there may be some likelihood of interstitial lung disease also. We are asking for a CT scan of the chest, high resolution, to determine the extent of his disease. Once this is done we can send a follow-up letter to his attorney," according to the doctor.

Dr. Matarese sent the following letter to Claimant's attorney on April 27, 2001 (CX 1 at 1,2):

We have completed our initial evaluation on Thomas Fagan. Mr. Fagan has significant asbestos exposure from his employment at Electric Boat. There is significant pleural disease characterized by thickening and calcification. There is also an element of parenchymal involvement seen on his CT scan with rounded atelectasis and partial inflammatory changes to his lower lung field.

The pulmonary function testing shows a significant restrictive ventilatory defect. This is very much compatible with asbestos related lung disease with significant pleural thickening and probable parenchymal involvement. The FVC is reduced to 68% of predicted and the FEV_1 is reduced to as low as 48% of predicted. Diffusion capacity is also moderately reduced to 11.7 ml/min or 55% of predicted.

Due to the rounded atelectasis that is seen on his CT scan, I am cautious because there does not appear to be a definitive statement by the radiologist that this is exactly the same as it was one year ago. Therefore, it warrants continued radiographic follow-up and I will be repeating his CT scan in six months. My worst fear is that this may represent a carcinoma. We do know that he had a prior history of a granuloma and underwent a wedge resection many years ago by Dr. Yasher.

If we utilize the **AMA Guides to the Evaluation of Permanent Impairment**, he would fall into a Class III 26-50% impairment of the whole person based upon his pulmonary function studies. Once I see Mr. Fagan again in September to review his repeat CT scan I will send you another follow-up report, according to the doctor.

Dr. Matarese reiterated his opinions at his April 11, 2002 deposition, the transcript of which is in evidence as CX 8. Dr. Matarese forthrightly testified herein and his opinions did not waver in the face of intense cross-examination by Employer's counsel.

The record also contains the March 13, 1990 report of Drs. James A. Craner and David G. Kern, Occupational Health Service of the Memorial Hospital of Rhode Island wherein the doctors conclude as follows (CX 5):

"In summary, this (is) a 54-year-old man with significant history of asbestos exposure through his work at Electric Boat, as well as a moderately extensive smoking history, who presented with a solitary pulmonary nodule in 1987, which was subsequently resected. The nodule proved to be a granuloma of uncertain etiology. The patient's history is otherwise notable for travel to the southwestern portion of the United States earlier in his military career. Functionally, he had no impairment prior to his lung operation. His pulmonary function tests are consistent only with mild, if any, obstructive airways disease and the suggestion of a restrictive component as well, part of which may be explained on the basis of his partial lung resection. The patient otherwise has no respiratory complaints and he currently does not smoke cigarettes.

"The patient's pulmonary lesion was not a malignancy. However, because of his past exposure to asbestos and cigarette smoke, he was at significantly increased risk for lung cancer at the time of his original evaluation and thus the lesion was appropriately resected. In the sense that Mr. Fagan had been exposed to a significant amount of asbestos, his operation and current post-operative problem are directly related to his work with asbestos and, therefore, attributable to his employment at General Dynamics. The exact diagnosis of his respiratory condition is most likely an old infection, such as tuberculosis, histoplasmosis or coccidiomycosis. However, we do not have the results of skin testing by which to prove or disprove these postulates. Functionally, the patient's only disability relates to his actual surgical procedure. We recommended to the patient that he follow—up with Dr. Yashar for an evaluation or what appears to be an intercostal nerve problem secondary to his surgical procedure. He has otherwise discontinued his smoking habit, and does not have any symptoms for which medical treatment would be appropriate. Chest x-ray at this time show no further nodules or other significant lesions.

"In conclusion, then, I would regard the treatment from December 1987 through February 1988 as having been related to his employment, with the caveat dismissed above. There appears to be no clinically significant loss of pulmonary function in this patient. However, as I mentioned above, his medical condition is now a post-surgical problem which still requires further treatment," according to the doctors.

The Employer's position is best summarized by the May 7, 2001 report of Dr. Daniel A. Gerardi, Director, Occupational Lung Diseases, Saint Francis Hospital and Medical Center, wherein the

doctor concludes as follows (RX 13):

“**IMPRESSIONS:**

1. Chronic obstructive pulmonary disease with a history of cigarette smoking.

2. History of asbestos exposure during employment at Electric Boat Shipyard with the development of bilateral pleural plaques, without the development of asbestosis.

3. History of granuloma of the right lung, status post wedge resection and focal scarring of the right chest following surgical intervention.

4. Coronary artery disease with a history of myocardial infarction, coronary artery bypass grafting and angioplasty with stenting procedure.

5. Peripheral vascular disease with a history of bilateral carotid endarterectomy.

6. Bilateral inguinal hernia by patient history.

7. Restrictive lung disease related to obesity and previous coronary artery bypass grafting.

“**COMMENTS AND RECOMMENDATIONS:** Mr. Fagan is primarily suffering from chronic obstructive pulmonary disease, which is responsible for producing his symptoms of shortness of breath. This is related to a history of cigarette smoking that was extensive and beginning at an early age, although discontinued now for some time. His history of progressive and gradual onset of shortness of breath is consistent with the development of this disease as is his physical examination, radiographic findings and pulmonary function testing. Further complications related to his history of cigarette smoking are coronary and peripheral vascular disease.

The patient has a history of asbestos exposure during his employment at the Electric Boat Shipyard with the exposure documented in the patient′s occupational history. This is confirmed by x-ray and CT scan findings, showing bilateral pleural plaques with evidence of calcification. There is no evidence of pulmonary fibrosis, that is asbestosis, as a result of this asbestos exposure. I also do not see evidence of malignant tumor or rounded atelectasis, which would result from this patient′s asbestos exposure and, therefore, there was no physiologic impairment demonstrated. The focal area of fibrosis initially thought to be related to rounded atelectasis is indeed rounded atelectasis but rather focal scarring in the right chest related to his prior surgical procedure and is not at all consistent with such diagnosis.

The patient further demonstrates a restrictive respiratory impairment. This is related in part to the patient's obesity given the reduction in FRC and ERV seen on pulmonary function study. It is likely a small component is related to prior coronary artery bypass grafting and perhaps even a small component to his prior wedge resection although I think this is probably insignificant. Incidentally, the resection for this granuloma indicated a benign tumor, fortunately, but I can certainly see why this procedure was done given the patient's history of cigarette smoking and the noted lung nodule on plane film.

I do feel that Mr. Fagan has reached the point of maximum medical improvement. I am unable to give an accurate estimate of the patient's respiratory impairment with the AMA guidelines because of the patent's suboptimal performance and poor effort in the pulmonary function study done today. This study, particularly the loss of diffusion capacity, however, would allow us to estimate his impairment to likely be in the "Class IV range, probably 50% of the whole person. Any respiratory impairment, however, is primarily related to the patient's history of chronic obstructive pulmonary disease with small components due to his restrictive component but none of the impairment related to his history of asbestos exposure with pleural plaquing alone. It is obvious, therefore, that the patient's present injury including the benign pleural plaques related to asbestos exposure, is not the sole cause of his impairment but rather a combination of effects, particularly chronic obstructive pulmonary disease and restrictive disease, making his overall impairment materially and substantially greater than any one condition alone, according to the doctor.

Dr. Gerardi clarified his opinions in his January 10, 2001 letter to Employer's attorney wherein the doctor states as follows (RX 16):

"I am pleased to be able to clarify my assessment of Mr. Thomas Fagan's respiratory impairment, as put forth in my independent medical examination of May 7, 2001.

"The specific impairment remains inexact and is estimated because of the patient's performance on the pulmonary function study, but I expect it is approximately 50% of both lungs and the whole person. The etiology of the impairment, however, is not ambiguous. The majority of this impairment, 40% of the whole person, is assessed to chronic obstructive pulmonary disease related to his history of cigarette smoking. The remaining 10% impairment is divided equally between restrictive disease from mild obesity and postoperative changes. None of this impairment is currently related to his history of asbestos exposure or pleural plaquing."

Dr. Gerardi reiterated his opinions at his February 20, 2002 deposition, the transcript of which is in evidence as RX 18. The doctor's opinions will be discussed further in the section entitled

injury.

The record also contains the March 13, 1996 **Office Consult** of Dr. George R. McKendall wherein the doctor reports (RX 3):

> "Mr. Fagan is referred by Dr. Duane Golomb for evaluation. He is a 60 year old gentleman with a history of coronary artery disease. In April 1994, he had a non Q wave myocardial infarction complicated by post infarct angina. Subsequent to this, he had cardiac catheterization which revealed essentially normal LV function and single vessel disease involving a complex LAD stenosis. He underwent successful angioplasty of the LAD. He returned, however, with aggressive restenosis. As a consequence of this he was referred for elective bypass surgery in June 1994. This was performed by Dr. Singh and consisted of an internal mammary graft to the LAD.
>
> "He has done well since then until recently when noticed at the beginning of the year exertional chest pain which occurred with exertion while at work at Electric Boat. His symptoms are not predictable or consistent. They occur while using his arms and upper body for his job. He has done these same activities, however, without developing of symptoms. Of note, he is fairly active around the house doing household chores including shoveling the snow this past winter. He has not had any symptoms during these activities. His symptoms are of mixed suspicion for angina.
>
> "Current medications are Lopressor 50 mg bid, aspirin qd, and Tagamet.
>
> "Physical exam: Blood pressure is 160/90 on the left and 162/88 on the right. Heart rate is 60 and regular. Head and neck are unremarkable. Jugular venous pressures are normal. Chest is clear. There is a right lobectomy scar. Cardiac exam reveals an S1 and an S2 which are normal. There are no murmurs, rubs or gallops. He has a well healing sternonomy scar with some mild keloid. Abdominal exam is benign. Extremities show no edema.
>
> "Electrocardiogram reveals normal sinus rhythm with normal axis and normal intervals. There are non specific Stand T wave changes.
>
> "The impression is that Mr. Fagan has chest pain two years following coronary artery bypass graft surgery. His symptoms are of mixed suspicion for angina. They are exertional but not consistent or predictable. On the basis of this, I have recommended that he undergo exercise stress testing. This will help evaluate the

etiology of his chest pain. In the meantime, he will continue his current medications. Of note, he reports that his cholesterol was 239 in Dr. Golomb's office. I have advised him of recent recommendations to lower his total cholesterol to less than 180 in the presence of established coronary disease. He will follow with Dr. Golomb for this. I will see him in follow up after his stress test. Further recommendations will follow," according to the doctor.

Dr. Duane T. Golomb then sent the following letter on August 14, 1996 to Dr. Wilfred Carney (RX 4):

"Thomas Fagan is our mutual patient. He has history of coronary artery bypass grafting and I understand you see him for vascular disease. He was in my office on 8/14/96, stating he had about one week of "spells". These spells would last 30 plus minutes. When they occur he gets a squeezing in his epigastrium and mid abdomen region. They are often associated with headaches which occur concurrently.

"On the day that I saw him he had one of these episodes after doing some yard work with moderate levels of exertion. He related that he had been to RI Hospital on the day prior to this visit, complaining of these symptoms. At RI Hospital they had noted a bruit in his left carotid and a carotid duplex scan was done which revealed a patent left carotid with right sided carotid stenosis of approximately 70-80%. He related he was having some paresthesia of the right side, including the arm and leg over the last week as well.

"My examination again revealed a bruit, he was not hypertensive, his lungs sounded clear. His heart appeared normal. His abdomen appeared benign to my exam. I did not feel an aortic aneurysm.

"My concerns include a cerebral aneurysm with some type of somatic dysfunction associated with symptoms of the cerebral aneurysm. I have sent him for a MRI of the brain. I am also concerned about a possible aortic aneurysm causing some abdominal complaints especially in light of his vascular history. He will be having a sonogram of the abdominal aorta and at the same time they can take a look at his gallbladder.

"My other concern is abdominal angina, perhaps in the superior mesenteric distribution. The crampy pain is quite concerning and I think the only way we are going to understand whether or not this is the problem is to consider angiography.

> "I felt that since you are his vascular surgeon, it would he best if you assess his history and examination before embarking on such a course. I have advised him to see you in the near future," according to the doctor.

Claimant was admitted to the Kent County Memorial Hospital on February 7, 1997 and the **Medical Chart History** reflects the following (RX 5):

PRESENT ILLNESS: This is a 61-year-old man who complains of chest pressure. He states he has been getting pain for about 2-3 days prior to admission, especially when he walks uphill at work. He works at Electric Boat and he has to walk up a rather long, gentle slope. He has been getting chest pressure after walking a small distance. He came into the Emergency Room on the day of admission because of chest pain at rest. He has been followed by Dr. McKendall at Rhode Island Hospital who was involved with his care when the patient had coronary artery bypass grafting two and a half years ago. The patient states he had one vessel disease but does not know which vessel it was, **i.e.**, if it was left main or not. Prior to the coronary artery bypass grafting the patient had had previous angioplasty.

Medications at this time include Lopressor 50 mg in the morning, 25 in the p.m., aspirin one daily, Zantac and Lescol 20 mg q.h.s. which has helped his cholesterol come down below 200. Otherwise he feels well, he denies any other medical problems. He has not smoked for nine years.

PAST MEDICAL HISTORY: He had a cholecystectomy in the recent past. He is status post right lung lobectomy for nodules which were found to be benign in the past.

No known drug allergies. HABITS: He denies smoking, he denies drinking.

REVIEW OF SYSTEMS: Negative, according to the doctor.

Dr. McKendall re-examined Claimant on February 10, 1997, at which time the doctor reported (RX 6-1):

Mr. Fagan is referred by Dr. Duane Golomb for evaluation. He is a 62 year old gentleman with a history of coronary artery disease. In April of 1994 he had a non Q wave myocardial infarction with post infarct angina. This prompted an LAD angioplasty. He had early resenosis and was referred for single vessel bypass surgery which consisted of a LIMA graft to the LAD. In March of 1996 he had recurrent symptoms which were somewhat atypical and epigastric. He underwent exercise thallium stress testing. He exercised for 7 minutes and 6 seconds of the Bruce protocol. He had non diagnostic EKG changes. He had no chest pain but stopped because of fatigue. His thallium scan revealed redistributing defects in the

distribution of the distal LAD and right coronary artery. At that time cardiac catheterization was offered but the patient refused. He did well apparently until several weeks ago when he noticed recurrent episodes of exertional chest discomfort. These occur mainly at work where he does great exertion at Electric Boat. His symptoms are relieved by rest or nitroglycerin. He was admitted to Kent County hospital overnight where myocardial infarction was apparently ruled out last week. His medications were adjusted and Procardia was added and he is referred now for evaluation and probable catheterization.

Past medical history is significant for the above. He is also Status post left carotid endarterectomy. He reports a 70% Stenosis in the right carotid. He had a cholecystectomy within the last year.

Current medications are Lopressor 50mg qam and 25mg qpm, aspirin, Zantac, Lescol, and Procardia XL 30 qd.

Allergies are none known.

Blood pressure is 140/80 on the left and 145/82 on the right. Heart rate is 65. Jugular venous pressures are normal. There is a left carotid endarterectomy scar. Chest is clear. Cardiac exam reveals an S1, S2 which are normal. There are no murmurs, rubs or gallops. Abdominal exam is benign. Extremities show no edema. Pulses are 2+ at the femoral, dorsalis pedis and pretibial.

Electrocardiogram reveals a normal sinus rhythm with normal axis and normal intervals. There are non specific ST changes inferiorly. He has left atrial abnormality.

The impression is that Mr. Fagan has coronary artery disease with recurrent symptoms consistent with angina in the setting of a positive stress test last March. Given his change in symptomotology I have advised him that cardiac catheterization would be indicated in order to define anatomy and further guide therapy. I have discussed in detail the risks, benefits, and indications for catheterization with Mr. Fagan and his wife. He is reluctant to proceed with this at this time and wonders what alternatives there are. The only alternative would be to maximize his medical therapy and repeat his stress testing if he is asymptomatic on meds. Mr. Fagan prefers to proceed with medical therapy at this time. I have increased his Lopressor to 50mg bid. He will continue the Procardia XL. I have instructed him on signs of angina and told him to call if he has any resting symptoms. I will see him in follow up in 3 or 4 weeks. He will follow with Dr. Golomb in the interim, according to the doctor.

Dr. McKendall next saw Claimant on April 18, 1997 (RX 6-2):

Mr. Fagan comes in today for follow up. He underwent

> percutaneous revascularization of his right coronary artery on April 3rd using two 4.0mm intracoronary stents. Since being discharged from the hospital he has not had any angina whatsoever. He has been modestly active with walking around the house without any provokable symptoms. He feels better.
>
> Current medications are Lopressor 50 bid, aspirin qd, Zantac, Procardia XL 30 qd, Ticlid 250mg bid for one month, and Lescol.
>
> Physical exam blood pressure is 140/70. Heart rate is 72. Head and neck are unremarkable. Jugular venous pressures are normal. Chest is clear. Cardiac exam reveals an S1 and an S2 which are normal. His left femoral site is slightly ecchymotic with a non pulsatile non tender small hematoma.
>
> The impression is that Mr. Pagan is doing well status post stent placement to the right coronary artery. He is asymptomatic. I have advised him to continue his current medications. He will be scheduled for a thallium stress test. He will call after the stress test to discuss the results. Assuming it is non ischemic he will be referred to the cardiac rehab program, according to the doctor.

Dr. Golomb saw Claimant several times between February 19, 1998 and April 5, 2000 and the doctor's progress notes are in evidence as RX 7. Dr. Golomb also saw Claimant on September 21, 2000 (RX 11), at which time he reported:

The patient is a 64-year-old man.

PAST HISTORY: Remarkable for coronary artery disease, bilateral carotid endarterectomy, right thoracotomy for nodule removal, cholecystectomy, right shoulder pain in the past, hyperlipidemia.

MEDICATIONS: Zantac, 150 b.i.d. Lopressor 50 mg 1 1/2 tablet daily, Lescol 20 mg ME aspirin daily, nitroglycerin pm daily. The patient is status post angioplasty in 1994, also one vessel bypass in 1994.

REVIEW CF SYSTEMS: Patient denies chest pain, denies any nocturia.

ALLERGIES: None known.

HABITS: Does not smoke...

PHYSICAL EXAM: See written physical form.

IMPRESSION: 1. Hyperlipidemia, cholesterol down to 208, HDL 44, LDL 112. Plan at this time to continue the same medication. He refuses

to increase the Lescol from 20 to 40. 2. Coronary artery disease stable, no changes. 3. Carotid disease, no changes, according to the doctor.

Dr. McKendall next saw Claimant on February 2, 2001, at which time the doctor reported (RX 12):

> Mr. Fagan comes in today for follow-up. He has not been seen in the office since l997. He comes in today with complaints of rare chest tightness. Since his last visit here, he has undergone a right carotid endarterectomy. He has not had predictable angina with exercise involving 20 minutes of walking per day. Over the last several months, however, he has had two episodes of chest tightness which occurred after exertion. There is no associated diaphoresis, dyspnea, nausea/vomiting, or radiation. The symptoms are self resolved after a short period of time. He has not had other symptoms. He presents for evaluation.
>
> **Current Medications:** Lopressor 50 QAM and 25 QPM, Lescol 20 QD, and aspirin...
>
> **Impression:** Mr. Fagan has coronary disease with remote bypass surgery and remote stenting. He has been asymptomatic until recently with two episodes of chest discomfort. These have modest suspicion for angina. I have advised him to undergo a stress echo in order to evaluate for provokable ischemia. He sees Dr. Golomb for risk modification and I have reviewed guidelines with him with a goal of an LDL of less than 100. He will call once the stress test is performed and further recommendations will be made accordingly.

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a most credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8

BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing

entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents substantial evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. I reject both contentions. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**,

Sinclair v. United Food and Commercial Workers, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which negates the connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not negate the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which negates the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich**

Collieries, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp**., 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Sir Gean Amos v. Director, OWCP,** 153 F.3d 1051, **amended**, 164 F.3d 480, 32 BRBS 144 (CRT)(9th Cir. 1999).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his asbestos related disease, resulted from his exposure to and inhalation of asbestos and other injurious pulmonary stimuli at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. In this regard, **see Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989). Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S.**

Department of Labor, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

As already noted above, the Claimant has established through his own testimony that he has a lung disorder and that he was heavily exposed to asbestos and other lung irritants while working for the Employer. His testimony is sufficient to invoke the 20(a)

presumption. **Hughes vs. Bethlehem Steel Corp**, 17 BRBS 153[1985]; **Kier, supra**. The Claimant's testimony is also buttressed by the medical reports and forthright testimony of Dr. Matarese, as well as the report prepared on the Employer's behalf by Dr. Kern. As also noted above, in order to rebut the presumption the Employer must establish that Claimant's condition was not caused or aggravated by his employment. **Rajotte vs. General Dynamics Corp.**, 18 BRBS 85[1986]. The evidence offered by the Employer to rebut the presumption must be substantial enough to negate the potential connection between the Claimant's injury and harmful working conditions. **Swinton, supra**.

The Employer presents the report and testimony of Dr. Gerardi (RX 18) as rebuttal evidence. At first blush Dr. Gerardi's testimony might appear sufficient to rebut the presumption. His opinions, however, do not stand up to close scrutiny. The report and testimony actually support Claimant's essential thesis as Dr. Gerardi acknowledges the presence of pleural plaques, a marker of prior asbestos exposure.

The overall thrust of Gerardi's testimony is that Mr. Fagan's mixed lung disease is due to his smoking-related obstructive disease as well as restrictive disease due to obesity and the 1987 lung resection. First of all, the attribution of any impairment to obesity is absurd in a case involving a 5'9" man who weighs 165—170 lbs. This is particularly so where the **AMA Guidelines** do not even provide for any consideration of weight in determining predicted values. (RX 18 at 31). In the setting of a patient like the Claimant whose weight and body mass are entirely normal, Dr. Gerardi's effort to attribute restrictive disease to obesity is simply farfetched. Dr. Gerardi admits that Mr. Fagan was exposed to asbestos, that he has pleural plaques, that he had rales on physical examination and that he has diminished diffusing capacity, a key objective finding which is consistent with restrictive disease and effort-independent. Since Claimant is manifestly not obese, the only reasonable explanation for his restrictive lung disease is asbestos exposure. Dr. Gerardi's refusal to admit this is not credible, and I so find and conclude.

Dr. Gerardi also admits that the Claimant's reduction in lung volumes may be due to the 1987 wedge resection of the right lung. The Employer has not offered any evidence to rebut Dr. Kern's opinion that the need for surgery was created by the risk of lung cancer arising from Claimant's extensive asbestos exposure. Dr. Kern saw Claimant on the Employer's behalf and it may be presumed that his opinion led the Employer to ultimately accept Mr. Fagan's claim for compensation arising from the surgery.

Even assuming, **arguendo**, that reviewing authorities should hold, as a matter of law, the Employer has presented substantial evidence to rebut the presumption, the overwhelming weight of the

evidence still (1) leads to the conclusion that Claimant has established a work-related injury and (2) justifies an award of benefits. Dr. Gerardi's opinions are based on the dubious conclusion that Claimant is obese, defying logic in an effort to avoid the numerous indicia of asbestos-related lung disease. The doctor's dissembling is even apparent in his decision to award a fifty (50%) percent permanency rating while finding Claimant to fall within an impairment category which merits a rating of 51%-100% [RX, p.7].

On the other hand, the well-reasoned opinions of Dr. Matarese are buttressed by Dr. Gaensler's B-reading of the Claimant's chest x-ray and Dr. Kern's finding that Claimant's 1987 lung resection was causally related to his heavy asbestos exposure for many years at the Employer's shipyard.

Accordingly, in view of the foregoing, I have given lesser weight to the opinions of Dr. Gerardi as his opinions are far outweighed by the totality of the well-reasoned and well-documented opinions of the Claimant's medical providers, especially as Dr. Gerardi ignores the well-settled concept of "aggravation" in worker's compensation law and the interplay of Claimant's multiple medical problems.

Thus, I find and conclude that Claimant's asbestos-related disease constitutes a work-related injury, that the Employer had timely notice thereof, that the Employer timely controverted Claimant's entitlement to benefits and that he timely filed for benefits once a dispute arose between the parties.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Average Weekly Wage

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. **Todd Shipyards Corp. v. Black**, 717 F.2d 1280 (9th Cir. 1983); **Hoey v. General Dynamics Corporation**, 17 BRBS 229 (1985); **Pitts v. Bethlehem Steel Corp.**, 17 BRBS 17 (1985); **Yalowchuck v. General Dynamics Corp.**, 17 BRBS 13 (1985).

The 1984 Amendments to the Longshore Act apply in a new set of rules in occupational disease cases where the time of injury (**i.e.**, becomes manifest) occurs after claimant has retired. **See Woods v. Bethlehem Steel Corp.**, 17 BRBS 243 (1985); 33 U.S.C. §§902(10), 908(C)(23), 910(d)(2). In such cases, disability is defined under Section 2(10) not in terms of loss of earning capacity, but rather in terms of the degree of physical impairment as determined under the guidelines promulgated by the American Medical Association. An employee cannot receive total disability benefits under these provisions, but can only receive a permanent partial disability award based upon the degree of physical impairment. **See** 33 U.S.C. §908(c)(23); 20 C.F.R. §702.601(b). The Board has held that, in appropriate circumstances, Section 8(c)(23) allows for a permanent partial impairment award based on a one hundred (100) percent physical impairment. **Donnell v. Bath Iron Works Corporation**, 22 BRBS 136 (1989). Further, where the injury occurs more than one year after retirement, the average weekly wage is based on the National Average Weekly Wage as of the date of awareness rather than any actual wages received by the employee. **See** 33 U.S.C. §910(c)(2)(B); **Taddeo v. Bethlehem Steel Corp.**, 22 BRBS 52 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 46 (1989). Thus, it is apparent that Congress, by the 1984 Amendments, intended to expand the category of claimants entitled to receive compensation to include voluntary retirees.

However, in the case at bar, Claimant may be an involuntary retiree if he left the workforce because of work-related pulmonary problems. Thus, an employee who involuntarily withdraws from the workforce due to an occupational disability may be entitled to total disability benefits although the awareness of the relationship between disability and employment did not become manifest until after the involuntary retirement. In such cases, the average weekly wage is computed under 33 U.S.C. §910(C) to reflect earnings prior to the onset of disability rather than earnings at the later time of awareness. **MacDonald v. Bethlehem Steel Corp.**, 18 BRBS 181, 183 and 184 (1986). **Compare LaFaille v. General Dynamics Corp.**, 18 BRBS 882 (1986), **rev'd in relevant part sub nom. LaFaille v. Benefits Review Board**, 884 F.2d 54, 22 BRBS 108 (CRT) (2d Cir. 1989).

Thus, where disability commences on the date of involuntary withdrawal from the workforce, claimant's average weekly wage should reflect wages prior to the date of such withdrawal under Section 10(c), rather than the National Average Weekly Wage under Section 10(d)(2)(B).

However, if the employee retires due to a non-occupational disability prior to manifestation, then he is a voluntary retiree and is subject to the post-retirement provisions. In **Woods v. Bethlehem Steel Corp.**, 17 BRBS 243 (1985), the Benefits Review Board applied the post-retirement provisions because the employee retired due to disabling non-work-related heart disease prior to the manifestation of work-related asbestosis.

Claimant is a voluntary retiree under the Act as he retired in September of 1998 after he left work due to a non-work-related cardiovascular condition. As the parties have stipulated to March 15, 2001 as the date of Maximum Medical Improvement, based on Dr. Matarese's opinion (CX 1), I find and conclude that Claimant's asbestos-related disease may reasonably be rated, pursuant to Section 8(c)(23), as fifty-one (51%) percent of the whole person, and an appropriate award will be entered herein.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer timely controverted Claimant's entitlement to benefits. **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by

the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic &**

Gulf Stevedores, Inc. v. Neuman, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of his work-related injury in a timely manner and requested appropriate medical care and treatment. However, the Employer did not accept the claim and did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

Accordingly, the Employer shall authorize and pay for the reasonable and necessary medical care and treatment relating to Claimant's asbestos-related disease, commencing on March 15, 2001 (CX 1-6), the date on which his pulmonary function tests reflected his mixed pulmonary disease. The Employer shall also authorize and pay for a complete annual physical examination, including pulmonary testing, as Claimant is at an increased risk to develop lung cancer.

Responsible Employer

The Employer as a self-insurer is the party responsible for payment of benefits under the rule stated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom. Ira S. Bushey & Sons, Inc. v. Cardillo**, 350 U.S. 913 (1955). Under the last employer rule of **Cardillo**, the employer during the last

employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award. **Cardillo**, 225 F.2d at 145. **See Cordero v. Triple A. Machine Shop**, 580 F.2d 1331 (9th Cir. 1978), **cert. denied**, 440 U.S. 911 (1979); **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977). Claimant is not required to demonstrate that a distinct injury or aggravation resulted from this exposure. He need only demonstrate exposure to injurious stimuli. **Tisdale v. Owens Corning Fiber Glass Co.**, 13 BRBS 167 (1981), **aff'd mem. sub nom. Tisdale v. Director, OWCP, U.S. Department of Labor**, 698 F.2d 1233 (9th Cir. 1982), **cert. denied**, 462 U.S. 1106, 103 S.Ct. 2454 (1983); **Whitlock v. Lockheed Shipbuilding & Construction Co.**, 12 BRBS 91 (1980). For purposes of determining who is the responsible employer or carrier, the awareness component of the **Cardillo** test is identical to the awareness requirement of Section 12. **Larson v. Jones Oregon Stevedoring Co.**, 17 BRBS 205 (1985).

The Benefits Review Board has held that minimal exposure to some asbestos, even without distinct aggravation, is sufficient to trigger application of the **Cardillo** rule. **Grace v. Bath Iron Works Corp.**, 21 BRBS 244 (1988); **Lustig v. Todd Shipyards Corp.**, 20 BRBS 207 (1988); **Proffitt v. E.J. Bartells Co.**, 10 BRBS 435 (1979) (two days' exposure to the injurious stimuli satisfies **Cardillo**). **Compare Todd Pacific Shipyards Corporation v. Director, OWCP**, 914 F.2d 1317 (9th Cir. 1990), **rev'g Picinich v. Lockheed Shipbuilding**, 22 BRBS 289 (1989).

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **Director, OWCP v. Luccitelli**, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992), **rev'g Luccitelli v. General Dynamics Corp.**, 25 BRBS 30 (1991); **Director, OWCP v. General Dynamics Corp.,** 982 F.2d 790 (2d Cir. 1992); **FMC Corporation v. Director, OWCP**, 886 F.2d 1185, 23 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v.**

Director, OWCP, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), **rev'd and remanded on other grounds sub nom. Director v. Berkstresser, 921 F.2d 306 (D.C. Cir. 1990)**; **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), **aff'd**, 718 F.2d 644 (4th Cir. 1983). **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, **supra**, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, **supra**.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS

666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2D 602 (3d Cir. 1976).

An x-ray showing pleural thickening, followed by continued exposure to the injurious stimuli, establishes a pre-existing permanent partial disability. **Topping v. Newport News Shipbuilding**, 16 BRBS 40 (1983); **Musgrove v. William E. Campbell Co.**, 14 BRBS 762 (1982).

Section 8(f) relief is not applicable where the permanent total disability is due solely to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991) In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have cause claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp. (Bergeron), supra.**

On the basis of the totality of the record, I find and conclude that the Employer has satisfied these requirements. The record reflects (1) that Claimant has worked for the Employer for forty-one (41) years, (2) that his asbestos-related disease was first seen on May 28, 1982 (CX 3), (3) that he continued to be exposed to asbestos and other injurious pulmonary stimuli at the Employer's shipyard, (4) that such worsening is seen on his subsequent diagnostic tests (CX 2), (5) that Claimant's permanent partial impairment is the result of the combination of his pre-existing permanent partial disability and his March 15, 2001 injury (CX 1-6) as such pre-existing disability, in combination with the subsequent work injury, has contributed to a greater degree of permanent disability, according to Dr. Matarese (CX 8) and Dr. Kern. (RX 18) **See Atlantic & Gulf Stevedores v. Director**, OWCP, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989).

Claimant's condition, prior to his final injury on March 15, 2001, was the classic condition of a high-risk employee whom a cautious employer would neither have hired nor rehired nor retained in employment due to the increased likelihood that such an employee would sustain another occupational injury. **C & P Telephone Company v. Director, OWCP**, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), **rev'g in part**, 4 BRBS 23 (1976); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Hallford v. Ingalls Shipbuilding**, 15 BRBS 112 (1982).

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. **Barclift v. Newport News Shipbuilding & Dry Dock Co.**, 15 BRBS 418 (1983), **rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.**, 737 F.2d 1295 (4th Cir. 1984); **Scott v. Rowe Machine Works**, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

Section 8(f) relief is not available to the employer simply because it is the responsible employer or carrier under the last employer rule promulgated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom. Ira S. Bushey Co. v. Cardillo**, 350 U.S. 913 (1955). The three-fold requirements of Section 8(f) must still be met. **Stokes v. Jacksonville Shipyards, Inc.**, 18 BRBS 237, 239 (1986), **aff'd sub nom. Jacksonville Shipyards, Inc. v. Director**, 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988).

In **Huneycutt v. Newport News Shipbuilding & Dry Dock Co.**, 17 BRBS 142 (1985), the Board held that where permanent partial disability is followed by permanent total disability and Section 8(f) is applicable to both periods of disability, employer is liable for only one period of 104 weeks. In **Huneycutt**, the claimant was permanently partially disabled due to asbestosis and then became permanently totally disabled due to the same asbestosis condition, which had been further aggravated and had worsened. Thus, in **Davenport v. Apex Decorating Co.**, 18 BRBS 194 (1986), the Board applied **Huneycutt** to a case involving permanent partial disability for a hip problem arising out of a 1971 injury and a subsequent permanent total disability for the same 1971 injury. **See also Hickman v. Universal Maritime Service Corp.**, 22 BRBS 212 (1989); **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78 (1989); **Henry v. George Hyman Construction Company**, 21 BRBS 329 (1988); **Bingham v. General Dynamics Corp.**, 20 BRBS 198 (1988); **Sawyer v. Newport News Shipbuilding and Dry Dock Co.**, 15 BRBS 270 (1982); **Graziano v. General Dynamics Corp.**, 14 BRBS 950 (1982) (where the Board held that where a total permanent disability is found to be compensable under Section 8(a), with the employer's liability limited by Section 8(f) to 104 weeks of compensation, the employer will not be liable for an additional 104 weeks of death benefits pursuant to Section 9 where the death is related to the injury compensated under Section 8 as both claims arose from the same injury which, in combination with a pre-existing disability resulted in total disability and death); **Cabe v. Newport News Shipbuilding and Dry Dock Co.**, 13 BRBS 1029 (1981); **Adams**, **supra**.

However, the Board did not apply **Huneycutt** in **Cooper v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 284, 286 (1986), where claimant's permanent partial disability award was for asbestosis and his subsequent permanent total disability award was precipitated by a totally new injury, a back injury, which was

unrelated to the occupational disease. While it is consistent with the Act to assess employer for only one 104 week period of liability for all disabilities arising out of the same injury or occupational disease, employer's liability should not be so limited when the subsequent total disability is caused by a new distinct traumatic injury. In such a case, a new claim for a new injury must be filed and new periods should be assessed under the specific language of Section 8(f). **Cooper**, **supra**, at 286.

However, employer's liability is not limited pursuant to Section 8(f) where claimant's disability did not result from the combination or coalescence of a prior injury with a subsequent one. **Two "R" Drilling Co. v. Director, OWCP**, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); **Duncanson-Harrelson Company v. Director, OWCP and Hed and Hatchett**, 644 F.2d 827 (9th Cir. 1981). Moreover, the employer has the burden of proving that the three requirements of the Act have been satisfied. **Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982). Mere existence of a prior injury does not, **ipso facto**, establish a pre-existing disability for purposes of Section 8(f). **American Shipbuilding v. Director, OWCP**, 865 F.2d 727, 22 BRBS 15 (CRT) (6th Cir. 1989). Furthermore, the phrase "existing permanent partial disability" of Section 8(f) was not intended to include habits which have a medical connection, such as a bad diet, lack of exercise, drinking (but not to the level of alcoholism) or smoking. **Sacchetti v. General Dynamics Corp.**, 14 BRBS 29, 35 (1981); **aff'd**, 681 F.2d 37 (1st Cir. 1982). Thus, there must be some pre-existing physical or mental impairment, **viz**, a defect in the human frame, such as alcoholism, diabetes mellitus, labile hypertension, cardiac arrhythmia, anxiety neurosis or bronchial problems. **Director, OWCP v. Pepco**, 607 F.2d 1378 (D.C. Cir. 1979), **aff'g**, 6 BRBS 527 (1977); **Atlantic & Gulf Stevedores, Inc. v. Director, OWCP**, 542 F.2d 602 (3d Cir. 1976); **Parent v. Duluth Missabe & Iron Range Railway Co.**, 7 BRBS 41 (1977). As was succinctly stated by the First Circuit Court of Appeals, ". . . smoking cannot become a qualifying disability [for purposes of Section 8(f)] until it results in medically cognizable symptoms that physically impair the employee. **Sacchetti**, **supra**, at 681 F.2d 37.

As Claimant is a voluntary retiree and as benefits are being awarded under Section 8(c)(23) for asbestos-related disease (CX 1), only his prior pulmonary problems can qualify as a pre-existing permanent partial disability, which, together with subsequent exposure to the injurious stimuli, would thereby entitle the Employer to Section 8(f) relief. In this regard, **see Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78, 85 (1989).

In **Adams**, the Benefits Review Board held at page 85:

"Regarding Section 8(f) relief and the Section 8(c)(23) claim, we hold, as a matter of law, that Decedent's pre-existing hearing loss, lower back difficulties, anemia and arthritis are not pre-existing permanent partial disabilities which can entitle Employer to Section 8(f) relief because they cannot contribute to Claimant's disability under Section 8(c)(23). A Section 8(c)(23) award provides compensation for permanent partial disability due to occupational disease that becomes manifest after voluntary retirement. **See**, **e.g.**, **MacLeod v. Bethlehem Steel Corp.**, 20 BRBS 234, 237 (1988); **see also** 33 U.S.C. §§908(c)(23), 910(d)(2). Compensation is awarded based solely on the degree of permanent impairment arising from the occupational disease. **See** 33 U.S.C. §908(c)(23). Section 8(f) relief is only available where claimant's disability is not due to his second injury alone. In a Section 8(c)(23) case, a pre-existing hearing loss, or back, arthritic or anemic conditions have no role in the award and cannot contribute to a greater degree of disability, since only the impairment due to occupational lung disease is compensated. In the instant case, therefore, only Decedent's pre-existing COPD could have combined with Decedent's mesothelioma to cause a materially and substantially greater degree of occupational disease-related disability. Accordingly, Decedent's other pre-existing disabilities cannot serve as a basis for granting Section 8(f) relief on the Section 8(c)(23) claim. Similarly, with regard to Section 8(f) relief and the Section 9 Death Benefits claim, only Decedent's COPD could, as a matter of law, be a pre-existing disability contributing to Decedent's death in this case. The evidence of record establishes a contribution from the COPD to Decedent's death, in addition to respiratory failure from mesothelioma. **See generally Dugas (v. Durwood Dunn, Inc.)**, **supra**, 21 BRBS at 279."

In **Adams**, the Board noted, "there is evidence that prior to contracting mesothelioma, Decedent suffered from chronic obstructive pulmonary disease (COPD), hearing loss, lower back difficulties, anemia and arthritis. The Director argues that Employer failed to establish any elements for a Section 8(f) award based on Claimant's pre-existing chronic obstructive pulmonary disease, back condition, arthritis and hearing loss."

Section 8(f) relief is not available to the Employer simply because it is the responsible employer or carrier under the last employer rule promulgated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom.**, **Ira S. Bushey Co. v. Cardillo**, 350 U.S. 913 (1955). The three-fold requirements of Section 8(f) must still be met. **Stokes v. Jacksonville Shipyards, Inc.**, 18 BRBS 237, 239 (1986), **aff'd sub nom. Jacksonville Shipyards, Inc. v. Director, OWCP**, 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988).

Moreover, Employer's liability is not limited pursuant to Section 8(f) where Claimant's disability did not result from the combination of coalescence of a prior injury with a present one. **Duncanson-Harrelson Company v. Director, OWCP**, 644 F.2d 827 (9th Cir. 1981). Moreover, the Employer has the burden of proving that three requirements of the Act have been satisfied. **Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982).

Moreover, the Benefits Review Board has held, as a matter of law, that a decedent's pre-existing hearing loss, lower back difficulties, anemia and arthritis are not pre-existing permanent partial disabilities which can entitle employer to Section 8(f) relief because they **cannot contribute** to decedent's disability under Section 8(c)(23). **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78, 85 (1989). In **Adams**, the Board held that Section 8(c)(23) compensates "only the impairment due to occupational lung disease" and "only decedent's pre-existing COPD (chronic obstructive pulmonary disease) could have combined with decedent's mesothelioma to cause a materially and substantially greater disease of occupational disease-related disability. Accordingly, decedent's other pre-existing disabilities cannot serve as a basis for granting Section 8(f) relief on the Section 8(c)(23) claim. Similarly, with regard to a Section 9 Death Benefits claim, only decedent's COPD could, as a matter of law, be a pre-existing disability contributing to decedent's death in this case." **Adams**, **supra**, at 85.

As already noted above, in the case **sub judice**, Employer has demonstrated the existence of such pre-existing permanent partial disability and, **a fortiori**, Section 8(f) relief is available herein, especially as all doctors are in agreement that Claimant's past cigarette smoking plays a part in his permanent partial impairment.

The Benefits Review Board has held that the Administrative Law Judge erred in setting a 1979 commencement date for the permanent partial disability award under Section 8(c)(23) since x-ray evidence of pleural thickening alone is not a basis for a permanent impairment rating under the **AMA Guides**. Therefore, where the first medical evidence of record sufficient to establish a permanent impairment of decedent's lungs under the **AMA Guides** was an April 1985 medical report which stated that decedent had disability of his lungs, the Board held that the permanent partial disability award for asbestos-related lung impairment should commence on March 5, 1985 as a matter of law. **Ponder v. Peter Kiewit Sons' Company**, 24 BRBS 46, 51 (1990).

Accordingly, in view of the foregoing, Claimant's benefits herein shall begin on March 15, 2001.

Section 3(e) of the Act

Section 3(e) of the Longshore Act provides:

> Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this Act pursuant to any other workers' compensation law or section 20 of the Act of March 4, 1915 (38 Stat. 1185, chapter 153; 46 U.S.C. 688) (relating to recovery for injury to or death of seamen) shall be credited against any liability imposed by this Act.

33 U.S.C. §903(e).

It is now well-established that a claimant can obtain concurrent state and federal awards payable by the same employer **for the same injury**, so long as the employer receives a credit to avoid double payment to the claimant. (Emphasis added)

Section 3(e) provides a statutory credit for state workers' compensation benefits or Jones Act benefits received by employees. This provision is consistent with prior cases holding employers are entitled to a credit under the Act for payments made pursuant to a state award. **Sun Ship, Inc. v. Pennsylvania**, 447 U.S. 715, 12 BRBS 890 (1980); **Calbeck v. Travelers Ins. Co.**, 370 U.S. 114 (1962). **See Darling v. Mobil Oil Corp.**, 864 F.2d 981, 986 (2d Cir. 1989) (state law preempted where it interferes with full execution of federal law); **Le v. Sioux City & New Orleans Terminal Corp.**, 18 BRBS 175 (1986). **Accord Bouchard v. General Dynamics Corp.**, 963 F.2d 541, 543-44 (2d Cir. 1992) (Connecticut law determined to conflict with § 3(e)); **Fontenot v. AWI, Inc.**, 923 F.2d 1127, 1132 n.38 (5th Cir. 1991). **Contra E.P. Paup Co. v. Director, OWCP**, 999 F.2d 1341, 27 BRBS 41, 48 (CRT) (9th Cir. 1993) (the Act does not preempt Washington state law requiring reimbursement of previously paid state benefits upon award of benefits under federal maritime law).

Section 14(k) of the 1972 LHWCA was changed to Section 14(j) by the 1984 Amendments. Pub. L. No. 98-426, 98 Stat. 1639, 1649, § 13(b). Section 14(j) of the LHWCA provides:

> (j) If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

33 U.S.C. § 914(j).

The purpose of Section 14(j) is to reimburse an employer for the amount of its **advance** payments, where these payments were too generous, for however long it takes, out of **unpaid** compensation found to be due. **Stevedoring Servs. of American v. Eggert**, 953 F.2d 552, 556, 25 BRBS 92, 97 (CRT) (9th Cir.), **cert. denied**, 112 S.Ct. 3056 (1992); **Tibbetts v. Bath Iron Works Corp.**, 10 BRBS 245, 249 (1979); **Nichols v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 710, 712 (1978) (employer's voluntary payments of temporary total disability credited against award of permanent partial compensation). Section 14(j) does not, however, establish a right of repayment or recoupment for an alleged overpayment of compensation. **Ceres Gulf v. Cooper**, 957 F.2d 1199, 1208, 25 BRBS 125, 132 (CRT) (5th Cir. 1992); **Eggert**, 953 F.2d at 557, 25 BRBS at 97 (CRT); **Vitola v. Navy Resale & Servs. Support Office**, 26 BRBS 88, 97 (1992).

Section 14(j) allows the employer a credit for its prior payments of compensation against compensation subsequently found due for that injury. **Balzer v. General Dynamics Corp.**, 22 BRBS 447, 451 (1989), **on recon, aff'd**, 23 BRBS 241 (1990); **Mason v. Baltimore Stevedoring Co.**, 22 BRBS 413, 415 (1989); **Mijangos v. Avondale Shipyards**, 19 BRBS 15, 21 (1986), **rev'd on other grounds**, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991). If the employer pays benefits and intends them as advance payments of compensation, the employer is entitled to a credit under Section 14(j). **Mijangos**, 19 BRBS at 21.

As already noted above, the employer is also entitled to a credit for payments made under a state compensation act for the same injury. **Garcia v. National Steel & Shipbuilding Co.**, 21 BRBS 314, 317 (1988); **Ferch v. Todd Shipyards Corp.**, 8 BRBS 316, 319 (1978); **Adams v. Parr Richmond Terminal Co.**, 2 BRBS 303, 305 (1975). **See also Lustig v. Todd Shipyards Corp.**, 20 BRBS 207, 212 (1988), **aff'd in part, rev'd in part, lustig v. U.S. Dept. of Labor**, 881 F.2d 593, 22 BRBS 159 (CRT) (9th Cir. 1989) (employer entitled to credit for proceeds of state workers' compensation settlement but **not** attorney fees or medical liens paid under state workers' compensation act).

However, it is well-settled that the employer is not entitled to a credit for payments made under a non-occupational insurance plan, as those payments are not considered "compensation" for the purposes of Section 14(j). **Pardee v. Army & Air Force Exch. Serv.**, 13 BRBS 1130, 1137 (1981). Because medical expenses are not "compensation," advance payments of compensation may not be credited against awarded medical expenses. **Aurelio v. Louisiana Stevedores**, 22 BRBS 418.423 (1989), **aff'd mem.**, No. 90-4135 (5th Cir. 1991). Interest is also not "compensation" for Section 14(j) purposes. **Castronova v. General Dynamics Corp.**, 20 BRBS 139, 141 (1987). **See also Sproull v. Stevedoring Servs. of America**, 25 BRBS

100, 112 (1991) (holding that interest is not compensation furthers goal of fully compensating claimant by not allowing employer an offset for its overpayments of disability compensation against interest awarded by the judge).

Moreover, the employer is not entitled to a credit for payments made by a non-occupational sickness and accident carrier, because the employer is not entitled to receive credit for money it never paid. **Mijangos**, 19 BRBS at 21; **Jacomino v. Sun Shipbuilding & Dry Dock Co.**, 9 BRBS 680, 684 (1979); **Pilkington v. Sun Shipbuilding & Dry Dock Co.**, 9 BRBS 473, 480-481 (1978).

The Employer has presented into evidence an additional copy of CX 4, now admitted as RX 21, as well as an approved stipulation under the State of Connecticut Workers' Compensation Act, admitted as RX 22. In its motion in support of the offer of additional evidence the Employer argues that any award made to Claimant should be offset by the payments documented in RX 21 and 22. The Employer admits, however, that the prior payments were for "**separate** injuries than the one presently before the court" (emphasis added).

The American Heritage Dictionary of the English Language, Fourth Ed., 2000, defines "separate," when used as an adjective, as:

> 1. Set or kept apart; disunited...; 2a. Existing as an independent entity...; 3.Dissimilar from all others; distinct...; 4. Not shared; individual....

Admissions made in pleadings "are used as judicial and not as evidential admissions and, for these purposes, until withdrawn or amended, are conclusive. **McCormick on Evidence**, West Publishing Co. 1976 **citing** Note, 64 **Colum.L. Rev.** 1121(1964).

As noted above, Section 3(e) provides a very limited set of circumstances under which Longshore awards will be reduced by prior payments made to a claimant:

> ... any amounts paid to an employee **for the same injury, disability or death for which benefits are claimed under this Act** pursuant to any other Workers' Compensation Law or Section 20 of the Act of March 4, 1915... shall be credited against any liability imposed by this Act. (Emphasis added)

Section 3(e) therefore provides a statutory credit for state workers' compensation benefits or Jones Act benefits received by employees. **Bouchard vs. General Dynamics Corp.**, 963 F. 2nd 541, 543-44 (2d Cir. 1992). The employer is entitled to a credit only if the claim is for the **same injury and disability** as the prior claim paid under state workers' compensation law or the Jones Act

(emphasis added). **D'Errico vs. General Dynamics Corp.**, 996 F. 2nd 503, 27 BRBS 24 (CRT) (1st Cir. 1993); **Garcia vs. National Steel & Shipbuilding Company**, 21 BRBS 314 1989; **Ponder vs. Peter Kiewit Sons' Co.**, 24 BRBS 46 (1990).

The Employer admits in its motion that the prior payments were for a separate injury than the one presently before the court, and this admission is taken as conclusive on the issue of whether the injuries are the same. The injury described in RX 21 and 22 was a claim for lung damage due to exposure to pulmonary irritants from 1958 through December 3, 1987. The claim before this Court is for lung disease due to exposure to lung irritants from December 1987 through January 1998. The uncontroverted testimony of Claimant establishes that he continued to be exposed to asbestos and other lung irritants up until the time he was forced to leave work in 1998 due to cardiovascular disease.

An "injury" occurs when the claimant establishes that he has sustained some physical and harm due to workplace activities. **Crawford vs. Director, OWCP**, 932 F. 2 152, 24 BRBS 123(CRT) (2d Cir. 1991); **Johnson vs. Brady-Hamilton Stevedore Company**, 11 BRBS 427 (1979). The harm suffered by Claimant in 1987 was the wedge resection of the right upper lobe which was necessary to determine whether he had lung cancer. The fear of cancer was based on his history of extensive asbestos exposure and smoking (RX 5 at 4) The surgical procedure resulted in residual pain and scarring but no respiratory complaints and no clinically significant loss of pulmonary function (RX 5, p. 4).

Claimant filed the claim pending before this Court when he was found by Dr. Matarese to have significant asbestos-related lung disease (CX 1). This injury is manifestly not "the same" as the medical procedure which gave rise to the 1987 claim. The prior claim was for reasonable medical care for what was found to be a benign healed granuloma of the right upper lobe; the procedure itself resulted in physical harm. The pending claim is for severe lung disease resulting from exposure to pulmonary irritants which lasted for ten years beyond 1987. The injuries are, as the employer characterized them, "separate", not at all the same.

I also note that if the claim before this Court were found to be the same claim reflected in CX 4, RX 21 and RX 22, then Claimant would be entitled to an award of permanent total disability from his last day of work in January of 1998.

Accordingly, in view of the foregoing, the Employer is not entitled to a credit for the amount reflected in RX 21 and RX 22.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a

self-insurer. Claimant's attorney filed fee applications on May 23, 2002 (CX 11) and on June 10, 2002 (CX 13), concerning services rendered and costs incurred in representing Claimant between June 28, 2001 and June 3, 2002. Attorney David N. Neusner seeks a fee of $10,225.86 (including expenses) based on 41 hours of attorney time and 4.50 hours of paralegal time at various hourly rates.

In accordance with established practice, I will consider only those services rendered and costs incurred after June 20, 2001, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration.

In light of the nature and extent of the excellent legal services rendered to Claimant by his attorney, the amount of compensation obtained for Claimant and the Employer's lack of comments on the requested fee, I find a legal fee of $10,225.86 (including expenses of $711.36) is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved. The expenses are approved as reasonable and necessary litigation expenses. My approval of the hourly rates is limited to the factual situation herein and to the firm members identified in the fee petition.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. Commencing on March 15, 2001, and continuing thereafter for 104 weeks, the Employer as a self-insurer shall pay to the Claimant compensation benefits for his fifty-one (51%) percent permanent partial impairment of the whole person from March 15, 2001 and continuing until further **ORDER** of this Court, based upon the National Average Weekly Wage of $466.91, such compensation to be computed in accordance with Sections 8(c)(23) and (2)(10) of the Act.

2. After the cessation of payments by the Employer, continuing benefits shall be paid, pursuant to Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act until further Order.

3. Interest shall be paid by the Employer on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due

until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

4. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, including a complete annual physical examination, commencing on March 15, 2001, even after the time period specified in the first Order provision above, subject to the provisions of Section 7 of the Act.

5. The Employer shall pay to Claimant's attorney, David N. Neusner, the sum of $10,225.86 (including expenses) as a reasonable fee for representing Claimant herein after June 20, 2001 before the Office of Administrative Law Judges and between June 28, 2001 and June 3, 2002.

A

DAVID W. DI NARDI
District Chief Judge

Boston, Massachusetts
DWD:dsr